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In the Supreme Court of the United States

OCTOBER TERM, 1964.

No. 879

MAMIE BISHOP, LEONARD SCHUMPERT, JANICE THOMAS, AUGUSTUS HUMPHERY and JUANITA UMPHRYES,

Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio.

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Petitioners,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The petitioners, Leonard Schumpert, Mamie Bishop, Janice Thomas, Augustus Humphery and Juanita Umphryes, pray that a write of certiorari issue to review the judgment of the Cuyahoga County Ohio Court of Appeals, made and entered by said Court on the 1st day of June 1964 (a copy of which is attached hereto as Appendix I).

The Ohio Supreme Court refused further appellate review which entries are attached hereto as Appendixes II and III (also, see 177 Ohio St. 57 [October 14, 1964]). A Rehearing was denied by the Ohio Supreme Court on November 18, 1964, which entry is designated herein as Appendix IV, thus making the judgment of the Court of Appeals final on that date—that is, November 18, 1964.

OPINIONS OF THE COURTS BELOW.

No opinions were rendered by the various courts in Ohio; hence, this cause is being presented from the posture that all the constitutional issues raised by the petitioners were resolved by the Ohio Courts against our contentions, and that the challenged judgment of the State Court does not purport to be based on independent State grounds. Also, that decisions on the federal constitutional questions were essential to the determinations made by that Court.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED.

The jurisdiction of this Court is invoked under Title 28 U. S. C. A. § 1257(3), which section pertinently provides:

> "Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: * * *, (3) by writ of certiorari * * * where any title, right, privilege or immunity is specially set up or claimed under the constitution."

This cause also involves the introduction in a state court of evidence seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution.

QUESTIONS PRESENTED FOR REVIEW.

I.

Whether the petitioners' convictions under R. C. of Ohio § 2915.13 is contrary to the due process clause of the Fourteenth Amendment to the United States Constitution because of the admission of evidence seized in violation of the "constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible against one who has standing to complain"?

II.

Whether a sufficient basis for the determination that probable cause existed to support the issuance of a search warrant was afforded by an affidavit which merely alleged:

a. that various items generally associated with the numbers game were in the possession of unknown persons, and

b. that such items were possessed by these "unknown persons" with the intent by them to commit a crime involving the numbers game, and

c. that affiant's belief was predicated on observation by the Cleveland Police and information from confidential sources.

III.

Whether a state court can refuse to require disclosure of an unnamed and unidentified informer where no probable cause can be shown to exist without the information of such informer?

IV.

Where an officer seeks a warrant based in part upon information supposedly supplied by an informer, whose identity is neither disclosed in the affidavit, nor inquired into by the magistrate, and where the affidavit does not disclose any basis for crediting the informer's information, can a trial court:

a. refuse to require that the identity of such informer be disclosed, and/or

b. allow the officer to conclusively establish that an alleged informer is reliable simply by affirming that he had supplied information in the past that was accurate.

V.

Can a State authorize the practice of permitting applicants for warrants to bolster their affidavits by the rendition of secret and unrecorded testimony to issuing magistrates; or, is the requirement of the constitution such that an affidavit is fatally defective when "it does not set forth any * * * sufficient basis upon which a finding of probable cause could be made," notwithstanding any supporting evidence that may have been considered by the issuing magistrate, but was not a part of the affidavit?

VI.

Whether a police officer can trespass upon private property in violation of the Constitution and state law, there secretly eavesdrop, and use what was supposedly heard as a basis for the establishment of probable cause for the issuance of a search warrant?

CONSTITUTIONAL PROVISIONS WHICH THE CASE INVOLVES.

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Fourteenth Amendment to the Constitution of the United States provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; *nor shall any State deprive any person of life, liberty or property, without due process of law;* nor deny to any person within its jurisdiction the equal protection of the laws." (Emphasis added.)

STATE OF THE PROCEEDINGS AT WHICH, AND MANNER IN WHICH, THE FEDERAL QUESTION SOUGHT TO BE VIEWED WAS RAISED.

Prior to trial petitioners formally filed their "Motion to Quash Search Warrant and Motion to Suppress [the Evidence]." It was alleged not only that the search warrant was issued without the requisite probable cause, but that the affidavit and warrant contained patent constitutional infirmities. Also it was alleged that the search warrant as issued authorized a general or exploratory search

in defiance of the constitutional proscription against unreasonable searches and seizures.

The reasons set forth in the written motion were supplemented during and following the pre-trial hearing when it was disclosed that the police trespassed and eavesdropped within the curtilage of the premises ultimately searched, and there acquired information relied on to establish probable cause. These issues, as well as those involving the existence and reliability of the alleged informant, were briefed and argued in the Trial Court, the Ohio Court of Appeals, and the Supreme Court of Ohio.

STATEMENT OF CASE.[1]

The petitioners were charged and convicted of violating Revised Code of Ohio § 2915.13. Specifically they were jointly charged with carrying on a scheme of chance; this crime is a felony under the laws of this State.

Prior to trial, the petitioners filed a joint "Motion to Quash the Search Warrant and to Suppress" as evidence certain property seized in violation of the Fourth and Fourteenth Amendments to the United States Constitution.[2] This Motion was denied and after a trial on the merits, in which the evidence sought to be suppressed was considered, the petitioners were convicted.

In due season, petitioners appealed this judgment to the Intermediate Court of Appeals and to the Supreme Court of Ohio. Although neither Court rendered a formal opinion, the convictions were upheld in both courts.

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[1] The complexity and nature of the issues herein require a somewhat detailed statement of the case.

[2] A copy of this Motion is attached to this petition and designated Appendix VII.

I.

The transcript of the trial evidence, hereinafter referred to as (R) shows as follows:

In opposition to the allegations set forth in petitioners' "Motion to Quash the Search Warrant and to Suppress" the evidence, the State's first witness, Lieutenant Carl Delau, testified that as a Sergeant of Detectives assigned to the Bureau of Special Investigations he was primarily concerned with investigating rackets and gambling operations. The officer testified that the investigation, which the State contended resulted in these arrests, began on May 14, 1962, and that "[he] received information during the morning of that particular day, Monday, May 14, 1962, from a reliable source that a John Powers was running a clearinghouse office at 12805 Edmonton" (R. 138). Officer Delau added that he and another officer later made observation of this address, which was where Powers lived, for the purpose of seeing if a 1959 Tan Buick —to which they had a partial license number—was on the scene, and that it was not (R. 22).

Next the officer stated that on the 15th, he and Patrolman McCool again made a surveillance of the vicinity of 12805 Edmonton and that about 2:15 p. m. "John Powers came driving down the street in his '59 Buick." Powers was said to have had a woman in the car with him; both entered the house. After being inside for about 10 minutes, both returned to the car and drove to Woodside (the next street north); the officers did not pursue them (R. 22-23). The Lieutenant admitted that he could not identify the woman who was with Powers.

On the following day the officers returned to the vicinity where they later saw Powers driving a 1961 Falcon; again there was an unidentified woman with him (R. 24). Also, that on this occasion both got out of the car and en-

tered the home, returning in about 5 or 10 minutes, and then proceeded in the Falcon to the front of 12611 Woodside, where they picked up two other women, who were waiting between the porch and the sidewalk. Again the officer admitted he did not know the females (R. 25). And when asked "Did you at any time learn their names?" replied: "No, I did not but I have my suspicions" (R. 25). Powers then was said to have continued east to 125th Street where he parked in front of 739 East 125th Street. The officer added: "At that time, I was just a short distance behind him. I seen three women hurriedly get out of the car and walk alongside the building of 739 East 125th, and they walked alongside this building towards the rear * * *" (R. 26). Lieutenant Delau next stated that Powers also got out of the car, went into a tavern, came out, and then disappeared. In the officers' words, "I did not see where he went" (R. 27).

On the following day—that is, the day of this arrest —Delau testified he assigned Patrolmen Wandra and McCool to make observations of 739 East 125th (this building was described as a two story brick building which had on the ground floor, in the front, several store fronts. In the rear on both the 1st and 2nd floors there were a total of six apartments). Delau gave officers Wandra and McCool these instructions:

> "* * * what to watch for there where the three girls disappeared to and where Powers had disappeared to and the instructions to ascertain just what door they went into and where they could have gone in that particular building which was under suspicion." (R. 30.)

Patrolman Wandra, in his evidence, testified that pursuant to these instructions he observed (about 2:30 p. m.) that John Powers and two females arrived in the Falcon

and entered a door on the south side of 739 East 125th Street. Officer Wandra then indicated that he posed as an insurance agent and made inquiries in the building to determine the correct address of the building (R. 36). Next, he entered the building by opening the door (R. 37), and that on the first floor there were two apartments but he did not hear any noise or activity coming from them. He then proceeded to the second floor "which housed apartments No. 5 and No. 5."[3] Also, that "[t]here was noise coming from both apartments; there was a radio and voices of humans talking and also adding machine noises" (R. 38).

Patrolman Wandra added that armed with this information he returned to his car and informed Patrolman McCool, the officer working with him, of his belief that the noises came from apartments No. 5 and No. 6. McCool then called Sergeant Delau, who began the warrant process (R. 40-44).

A further sequence of testimony revealed that upon receiving McCool's call between 3 and 3:15 p. m. Sergeant Delau contacted an assistant police prosecutor and related what information had been obtained over the past few days. Following which he was issued an affidavit for a search warrant (R. 44). (See Appendix V.) Delau a ter this stated that he located Judge Fuerst, who signed the affidavit upon which this warrant is based (R. 47). (See Appendix VI.)

Significantly, this experienced officer t stified that in procuring the signed affidavit from the Judge: "I told him what observations we made of the location, 739, the three

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[3] Of no mean significance is the fact that the location of the access stairway and hallways to these apartments was completely inside the building; hence, necessarily required that the officer trespass in order to listen at the doors "to see what the persons inside were doing" (R. 140-141).

days of observation, *the fact that there were two officers already on the scene* but were returning to Central Station. I indicated to him we were desirous of effecting a search that particular afternoon, and I related to him what we had found on making observation of that particular location." ([R. 46] Emphasis added.)

On cross examination Delau limited the extent of his conversation with Judge Fuerst. In this regard the following segment of that testimony is compelling:

"Q. In all about how long would you say you talked with Judge Fuerst?

A. It was probably no more than 5 minutes again, also.

Q. You were in a hurry?

A. I did inform him we were in a hurry.

Q. You indicated to him that you had already talked with Paul White? [The assistant prosecutor who prepared the affidavit.]

A. Yes, I did.

Q. And that Paul White had given you that affidavit which was marked State's Exhibit 2?

A. That is correct, yes.

Q. And you indicated that you wanted a warrant from him based on that affidavit?

A. I wanted a warrant from the clerk's office.

Q. Yes.

A. I wanted him to sign the affidavit.

* * * * *

Q. Now, when you talked with Judge Fuerst, did you tell him that you had information from a confidential, from confidential sources?

A. I related we had information, we started—

Q. No, no, did you tell him that you had information from confidential sources?

A. Yes, I did.

Q. All right. He read over this, didn't he?

A. He did

Q. And on here you said that you had made—you said this, "Observations made by members of the Cleveland Police Department and information from confidential sources"? Your conversation with him was about that?

A. That's correct.

Q. And you told him that you had seen—you had been been out there yourself personally on two previous days?

A. That is right.

* * * * *

Q. When you were out there making these observations, you didn't see anybody doing anything wrong, did you?

A. We did not.

Q. Yes, because if you had, you would have placed them under arrest?

A. Not necessarily.

Q. So that you told him the types of observations that you made?

A. Yes.

Q. And that type of observation is exactly what you told this Court?

A. That's correct.

Q. That you had not seen anyone, then, that you knew other than John Powers?

A. That is correct.

Q. And it is fact that during the observations that you made, you did not see anyone that you knew other than John Powers?

A. That is right.

Q. And the information that you had relative to John Powers concerned an address on Edmonton Avenue?

A. The original information was on Edmonton Avenue, that's correct.

Q. You are not suggesting to the Court that there was some additional information given you?

A. No, other than what we developed from that original information.

Q. Yes, but the only information that you had gotten from a confidential source related itself, did it not, sir, to John Powers and an address on Edmonton Avenue?

A. That is right.

Q. Yes, so that when you told Judge Fuerst that you had information from confidential sources, you didn't tell him what that information was, did you?

A. Yes, I did.

Q. You told him then that you had information that John Powers was operating a clearing house on 126—some odd number, Edmonton Avenue?

A. 12806 Edmonton Avenue.

Q. 12806 Edmonton Avenue; did you tell him who this confidential person was?

A. I don't believe I did.

Q. You don't believe you did, and he didn't inquire, then, did he?

A. No.

Q. Because if he had inquired, you would have told him?

A. I would have." (R. 58-62)

In this same sense consider also the following segment of testimony taken from Lieutenant Delau's cross examination:

"Q. I believe you testified that you talked with Patrolman McCool, over the phone and he related to you what had been told him by Mr. Wandra concerning Mr. Wandra's surveillance of the apartment?

A. Both his and Wandra's together and Wandra's separately, yes, Patrolman McCool related that to me.

Q. Yes, but you didn't talk with Wandra?

A. No, I did not, sir.

Q. So that when you talked with Judge Fuerst, you were relying in part on Mr. McCool's version of what Mr. Wandra had told him?

A. I was relying on what Patrolman McCool told me.

Q. And he told you what had been told him by Mr. Wandra?

A. That is correct." (R. 95-96)

The warrant actually issued was one of the infamous "John Doe" warrants which are a part of the Cleveland Police Department's *modus operandi*. (See, *State v. Young*, 185 N. E. 2d 33 [1962].) Moreover, according to the affiant, he preferred this type of warrant because "[they] wanted authority to search the persons on the premises who would be found there" (R. 73). In any event, Delau admitted that although he suspected that Mamie Bishop and John Powers would be found on the premises, their names were not specified in the affidavit; further, he did not reveal to the magistrate the fact that he suspected that these particular persons would be present.

"Q. Now, Lieutenant, when you went to this address, then, you're telling the Court that you expected to find at least Mamie Bishop and John Powers on the premises?

A. Yes, I did.

Q. You did?

A. I was pretty sure that I might see them there.

Q. Then why didn't you have this search warrant for those people you say you expected to find on the premises?

A. The prosecutor thought it was more appropriate to leave it as is to include everyone who might be on the scene taking part in an illegal operation.

Q. In other words, you wanted some additional authority so that you could search anybody that you saw fit on the basis of a John Doe warrant?

A. I wanted authority to search the persons on the premises who would be found there?

Q. Whether you had any reason to believe that they would be there or not?

* * * * *

A. I had reason to believe that there would be some 4 or 5 people there.

Q. So that when you told Judge Fuerst that you believe[d] this, believed numbers paraphernalia would be in the possession of unknown persons, you deliberately did not tell him that you believed it would be in the possession of John Powers and Mamie Bishop because you wanted to have complete authority to search everybody on the premises?

* * * * *

A. I wanted the authority to question and arrest anyone who would be in violation on that particular premises.

Q. But, Lieutenant, isn't it a fact that you always have authority to arrest people you see in violation of the laws?

A. That is true.

* * * * *

Q. If you went upon that premises with a warrant authorizing you to search it on the basis of information that you reasonably believed to the effect that Powers and Bishop had numbers paraphernalia in their possession, were operating a clearing house office there, and you saw other persons there engaged in that activity, you would arrest them, wouldn't you?

* * * * *

A. I would have.

Q. You would arrest them because you would have found them violating a law in your presence?

A. That is correct.

Q. And you could have questioned them and the same things that you could have done on the basis of this unknown person's warrant, couldn't you?

A. That is right.

Q. But the fact remains, Officer, you didn't expect to find Mamie Bishop there, did you?

A. I thought she could be there. I had a suspicion she could be there.

Q. But you didn't have any facts to support that suspicion, did you?

A. Not that we had seen her walk in, no.

Q. You hadn't even seen John Powers going in there, had you?

A. I had seen him walking into that building. My partner had seen him on that particular day.

Q. And when you arrived there with your warrant, he was not there, was he?

A. He was not" (R. 72-75).

As to the "informer," Delau was specifically asked to reveal the informer's name (R. 92). In this regard, counsel moved the Court to instruct the officer that disclosure was required (R. 92-93). The Court, citing *State v. Beck*, 175 Ohio St. 73, denied the request for disclosure (R. 95).

II.

Evidence presented by petitioners in support of their Motion included the testimony of Joseph Harper, one of the original defendants, who related that he had arrived on these premises only about twenty minutes before the officers made their entry (R. 198). Harper indicated he heard a knock at the door and Miss Umphryes, one of the petitioners, said: "Is that you Plug" and "someone answered someone said something. Anyhow she opened the door" (R. 199). Next he recalled that at first there was a bit of needling and after about 10-15 minutes, from the time the officers entered, while they were in the process of searching Schumpert and him, one of counsel's business cards was found, at which point Lieutenant Delau remarked: "Incidentally I have a search warrant." (R. 201.)

The petitioner, Umphryes, testified that she heard someone knock on the door, and when she inquired: if it were "Plug," her boy friend whom she was expecting, someone answered "yes," and that she "opened the door, seen it was white man, someone that I didn't know. I tried to close the door, and *it was forced open.*" ([R. 224] Emphasis added.)

Lieutenant Delau was quoted by this witness as having remarked: "I am Sergeant Delau, you are under arrest. This is a raid." (R. 224-225.) Further, in describing the personal search made of Harper and Schumpert, she added that when he came across counsel's business card Officer Delau exclaimed: "Incidentally I have a search warrant." (R. 225.) This was said to have occurred after the officers had been on the premises "Oh, a good ten minutes." (R. 226.)

When cross examined concerning the nature of the entry made by the officers, her testimony was amplified. Consider in this regard, the following significant segment of her testimony during cross examination:

> "Q. I believe what you said was when you opened the door you saw Sergeant Delau and he was a white man, is that right?
>
> A. Yes.
>
> Q. And you didn't know at that time whether Sergeant Delau was a police officer or whether he was a friend of Schumpert or Harper, did you?
>
> A. All I know is that I didn't know him.
>
> Q. You didn't know him, all right. When you were in the doorway there, did he tell you he was a police officer?
>
> A. In the doorway?
>
> Q. Yes.
>
> A. After he came in the door.
>
> Q. When you opened the door up, the first time you laid eyes on Sergeant Delau and realized he was

a white man, did he say anything to you to the effect that this was the police?

A. No, he did not." (R. 232-233.)

III.

In denying the Motions the trial court specifically held: "In this case, we have not only the word of an unnamed informer but we have primarily the observations of the police officers." (R. 316.) These observations were, of course, those particularized in the testimony of the officers. The sum effect of which was that none of the petitioners had been seen entering the premises and Patrolman Wandra actually trespassed on private property to eavesdrop for the express purpose of illegally obtaining facts to support the issuance of a warrant.

Also, the Court concluded that each of the officers gave evidence in support of the affidavit. This conclusion not only ignores the fact that Lieutenant Delau testified in a fashion inconsistent with such idea,[4] but the more obvious fact that there was nothing that could have been contributed by these officers to support this quest for a warrant.

Relative to the defense argument that Patrolman Wandra in gaining entrance to this private hallway of the

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[4] Officer Delau in testifying as to what he told the issuing magistrate in the "no more than 5 minutes" (R. 58) he talked to him stated: "I told him what observations we had made of the location * * * the fact that there were two men already on the scene but were returning to Central Station." (R. 46.) The problems involved in issuing warrants based on oral hearing as to probable cause are of no mean proportions. "If the supporting oath or affirmation is in written affidavit form and made a part of the search warrant the facts are readily passed on. If it was oral it is doubtful from a practical view-point whether it can ever be reproduced with exactitude, and an accused would never have an opportunity of knowing until he questioned the sufficiency of the showing of probable cause what the facts were upon which the warrant was issued." *Bedermarzik v. State*, 204 Ind. 517, 522 (1933).

building, for the purpose of eavesdropping, was thereby trespassing, the Court ruled that: "There was no trespassing upon the property of any of the defendants; that if, even conceding this could be a trespass, this was trespassing upon the whole property of the entire apartment and was not a trespass into the apartment of any one of the defendants."

As to this ruling, it is not clear what the court is saying; we will assume, however, that it was not holding that the petitioners did not have "standing to suppress." This is so because that argument was laid to rest in *Jones v. United States*, 362 U. S. 257 (1960).

ARGUMENTS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

No longer is it permissible for State Courts to sanction the wilful intrusions into one's rights of privacy by the police, or to otherwise negate constitutional rights guaranteed by the federal constitution. Certainly, it was because of the unwillingness of Ohio, among other states, to vindicate these rights that this Court's decision in *Mapp v. Ohio*, 367 U. S. 643 (1961), was absolutely required. *Ker v. California*, 374 U. S. 23 (1963), in turn imposed on the states the applicable standards of reasonableness, and *Beck v. Ohio* _____ U. S. _____ (1964), can only be viewed as another decision designed to compel the enforcibility of the Fourth Amendment by State Courts.

This cause, here on a petition for writ of certiorari, again brings before the Court the serious questions involved when State officers are permitted to conclusively predicate "probable cause" upon information supposedly supplied by nameless and possibly phantom informers. In urging that this cause is worthy of consideration, to petitioners' advantage is the fact that the trial court in deny-

ing the petitioners' quest for the disclosure based its ruling on the precedential authority of *State of Ohio v. Beck*, 175 Ohio St. 73 (1963), which case was recently reversed by this Court.

Significant to this petition is the fact that when this cause was considered by the appellate courts of Ohio it was reviewed in the light of the Supreme Court of Ohio's prior determinations in *State v. Beck, supra.* As a result, the intervening determination made by this Court in *Beck v. Ohio* necessarily requires that the cause of petitioners be considered in the light thereof. *Cf., Doughty v. Maxwell, Warden*, 376 U. S. 202 (1964); *McLeod v. Ohio*, 378 U. S. 582 (1964).

Also, it is our contention that the warrant here was not supported by probable cause and that the decision of this Court in *Aguilar v. Texas*, 378 U. S. 108 (1964), is controlling in a situation such as this, in which the affidavit only recited that the applicant had reliable information from a confidential source. In addition, in this cause the officer upon inquiry admitted that the issuing magistrate neither inquired nor was told who the "informer" was; there appears no basis either in the affidavit or the testimony to support the conclusions that he even existed, to say nothing of his reliability.[5] For all that appears, as in *Aguilar*, the magistrate routinely accepted as truth the affiant's "mere conclusion" in preference to performing his "neutral and detached" function, which is opposite to serving "merely as a rubber stamp for the police." *Id.*, 378 U. S. at 111-113.

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[5] Surely the elements of Due Process are at least vulnerable to abuse where in issuing a search warrant the magistrate accepts without question, and the aggrieved party is denied the right to effectively challenge, a police officer's assertion that an informer is reliable and did in fact supply information upon which it was reasonable for the Court to rely in authorizing a search.

I.

A Warrant Issued Without the Requisite Probable Cause Is Void and Any Search Made Pursuant Thereto Is Unreasonable.

A. The Fourth Amendment to the United States Constitution provides (as do the constitutions and/or statutes of the various states, although not always in the same phraseology), that: "* * * no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Cf., R. C. of Ohio § 2933.22.

Probable cause is said to exist, where the facts and circumstances within the officers' knowledge and of which they have reasonably trustworthy information sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being committed. *Brinegar v. U. S.*, 338 U. S. 160, 175 (1949).

Significantly, the affidavit filed herein alleged: that various items generally associated with the numbers game, were in the possession of unknown persons. That possession by these persons was with the intent to use such property to commit, either the crime of possession of bet slips or promoting a scheme of chance. Further the affidavit shows that it was based on observations by the Cleveland Police and information from confidential sources.

It seems appropriate to say that the purpose of the affidavit is to enable the appropriate magistrate to determine whether probable cause exists. According to this Court, the magistrate must judge for himself the persuasiveness of the facts relied on by the officers' conclusions as to the existence of probable cause *Giordenello v. United States*, 357 U. S. 480, 485 (1958). Also it has been

stated, that "* * * unless the magistrate makes his independent judgment on all known facts then he tends to become merely the tool of police interest." *Jones v. United States,* 362 U. S. 257, 273 (1960).

Suffice it to say, for an affidavit to be sufficient the requirement is that it must, standing alone, provide a basis for the determination that probable cause exists. In this affidavit such a basis is not afforded. At most the situation is comparable to the fact situation presented by *Giordenello v. United States, supra,* where it was held, and properly so, that where a warrant is issued without the requirement of probable cause it cannot form the basis for a valid search. And that an adequate basis for a finding of probable cause must be made to appear from the affidavit.

Judging the facts here by the standards imposed on the several states, by the Due Process Clause of the Fourteenth Amendment, we find merely that the affidavit issued to Sergeant Delau recited, first, that numerous items were in the possession of unknown persons at two different suites of an apartment building. Certainly, if as the law requires, he had in his possession sufficient facts to qualify for a warrant, he necessarily would have been able to state a designation other than "unknown persons."

Now two crimes are specified in the affidavits, i.e., possession of bet slips, and promoting a scheme of chance. On the other hand, it is clear that if the officers had "reasonable grounds to believe" or "probable cause" to believe persons were committing either one of these crimes it would have been proper to have secured an arrest warrant. Their failure to do so suggests the idea that the warrant was sought for the exclusive purpose of conducting an exploratory search. This thesis is supported by the fact that the warrant contained two addresses; trustworthy information would have been more specific.

Next, the affidavit suggests that members of the Cleveland Police Department made "observations." Even if the affidavit had shown that the affiant had made these observations, the mere recitation of that fact does not contribute anything to the sufficiency of the affidavit. The same is true of the mere statement "information from confidential sources." These conclusionary statements are at best indicative of the failure of the affiant to make a proper presentation to the issuing magistrate.

The test is not that the officer should be convinced of the existence of probable cause; the neutral and detached magistrate should be convinced. A proper affidavit would have stated what the information was that was received and would have included statements as to the reliability of the informant. The failure to observe these requirements very strongly exposes the thought that the affidavit did not allege sufficient facts as is required by law.

B. For a warrant to be proper it must particularly describe the place to be searched as well as the person or things to be seized. We begin with the premise that both general and exploratory seaches are unreasonable "per se." The same is true of warrants issued for that purpose. Here the warrant ostensibly authorized a search for a number of items; the mere possession of only one of which, a clearing house bet slip, constituted a crime. These other items specified in the warrant at most would be of an evidentiary nature; therefore, no warrant could be issued for their seizure. *United States v. Lefkowitz,* 285 U. S. 452, 464-465 (1932).

Although we concede that the argument being made at this juncture is ambitious, still the law is as stated in *Goulden v. United States,* 255 U. S. 298 (1921). In *Goulden,* some bills for legal services, an executed con-

tract and an unexecuted contract were seized under a valid search warrant by officers who were investigating an alleged use of mails to defraud the government. The Court held these documents were of "evidentiary value only" and therefore immune to seizure. Objects of "evidentiary value" are private articles or papers such as contracts, letters, invoices, etc., which are seized "solely for their use as evidence in a subsequent criminal trial."

It thus appears that with the exception of the bet slips, the items particularized in the warrant at best would have "evidentiary value only"; hence, their seizure even with a warrant would be unreasonable. See *Williams v. United States,* 263 F. 2d 487 (1959); *Morrison v. United States,* 262 F. 2d 449 (1958).

C. The warrant actually issued herein did not with sufficient particularity describe the place to be searched. The giving of *two* addresses not only belies the thought that probable cause existed; but more than that, it reflects on the specific requirement of a particular designation of a place to be searched. *A fortiori,* if the requirement for particularity of description of the place to be searched is to provide adequate means of identification which is not achieved by a description of two residences, when probable cause exists as to only one (*People v. Rainey,* 14 N. Y. 2d 35 [1964]; *United States v. Hinton,* 219 F. 2d 343 [1955]), then the warrant issued herein was void at its inception.

On the other hand, if the affiant had had probable cause sufficient for a warrant, at the very least, he could have offered an exact address. The same argument applies to the requirement of a particular description of the things to be seized, which requirement also appears to have been patently violated. (See *Marron v. United States,* 275 U. S. 192, 196 [1927], where this Court concluded that the re-

quirement of such particularity in a warrant is to make general searches under them impossible. And as to what is to be taken, nothing should be left to the discretion of the officer executing the warrant.)

D. General searches have long been deemed to violate fundamental rights and it is clear that the Fourth Amendment forbids them. The warrant issued herein in addition to "permitting" a search for evidence, in defiance of the constitution, purportedly was issued in the phantom case of "*State of Ohio v. John Doe* (real name unknown)," and alleged that the items mentioned were in his possession.

It is at once apparent, that if probable cause existed to arrest or search any individual then that person was capable of being described other than as "John Doe." If as the affidavit stated, the true name of "John Doe" (the person the officer swore was in possession of the "contraband") was unknown, then surely a suitable description could have been given. See 48 *Ohio Juris.* 2d, Search and Seizure, § 18, pp. 752-753; 47 *A. L. R.* 2d 1444.

Moreover, according to Lieutenant Delau's evidence, he only suspected that John Powers and Mamie Bishop would be on the premises. This admission by him is not only sufficient to expose the lack of probable cause, but dramatizes his, and the Cleveland Police Department's, ability to use devious methods to circumvent the constitution. This is so for two reasons, first there was no "probable cause" to believe any particular person would be on the premises. Next, if there were such "probable cause" then the persons should have been named or at least described. Cf. *Dow v. State,* 207 Md. 80 (1955); *Garrett v. State* [Okla.], 27 P. 2d 1101 (1954); *Parker v. State,* 177 Tenn. 380 (1941).

E. Knowledge obtained as a consequence of an unlawful or unreasonable search cannot be used to obtain a search warrant. Thus if the officers trespass (or otherwise intrude into a constitutionally protected area) in order to gain probable cause, the product of any subsequent search is considered "fruit of the poisonous tree." And under the "derivative evidence" rule is inadmissible to convict. *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920). Also see, *Nardone v. United States*, 308 U. S. 338 (1939). Cf., *Wong Sun v. United States*, 371 U. S. 471 (1963), in which the exclusionary rule was applied to voluntary oral declarations made during and as a consequence of an unconstitutional arrest.

Also in *Silverman v. United States*, 365 U. S. 505 (1961), this Court ruled on the constitutionality, under the Fourth Amendment, of the use of a "spike microphone," which the police inserted in a crevice of a party wall which permitted them to listen to conversations throughout the house, thus affording the means of gathering evidence. This decision was "based upon the reality of an actual intrusion into a constitutionally protected area." Here the Court agreed that even a technical trespass could not be indulged in to obtain probable cause, and declared that the constitution had been violated.

The same would of course be true if an officer should enter the yard, the curtilage, the hallway, or room of private premises. In this regard, see *Work v. United States*, 243 F. 2d 660 (1957), where the police without a warrant, and without cause to arrest or search, entered private premises and observed the defendant walk out of the house to an area under the porch. The officers who followed her saw something (that later turned out to be narcotics) being put into the garbage can located in the porch area, within

the "curtilage" of the home. In holding that the evidence was suppressible, the Court stated that "it would be unacceptably naive to conclude that this attempt by her to hide the [narcotics] immediately following the *presence of the officers in the hall,* and the finding of the [narcotics] by the officers, were not direct consequences of their unlawful entry. *Id.* at 662.

The analogy here is perfect; Patrolman Wandra was a trespasser when he invaded this hallway to eavesdrop. This is so, because it cannot be seriously argued that the stairway and halls of 739 East 125th were not within the curtilage of Apartment #6.

II.

The Statutes Requiring Notice of Authority and Purpose Before Forcing Entry Into a Private Home Are Strictly Construed.

Even if we assume that the warrant herein was in all respects properly issued, still the fact that it was not executed in compliance with the statute, in such cases made and provided, is alone sufficient to invalidate it and render a search ostensibly made pursuant thereto unreasonable. In this regard, our code provides that an officer may break down an outer door, or inner door, or window of a dwelling house or building if, after notice of his intention to make search pursuant to a warrant, he is refused admittance. R. C. of Ohio, § 2935.12.

This formality, which requires the police to say who they are and state why they demand admittance, is of ancient vintage, going all the way back to the 15tn Century in the English Common Law. Thus, an otherwise valid search can deteriorate into the zone of "unreasonableness" merely by failure to comply with the statute relative to execution thereof.

Of considerable importance in this phase of our contentions is the case of *Miller v. United States,* 357 U. S. 301 (1958). In *Miller,* the Supreme Court reversed the conviction of a notorious, and undoubtedly guilty narcotic peddler simply because the police, who broke into his apartment and found a large quantity of heroin, neglected to first announce their purpose and authority in demanding entrance.

The above case is further significant because there was an abundance of "probable cause" to enter the premises, although without a warrant, to effect an arrest. The Court held that this failure to comply with the statutory notice requirement rendered the search unlawful. It is submitted that the statute involved in the *Miller* case and Ohio's notice statute are sufficiently comparable to require comparable rulings for comparable violations by the police.

III.

When the Identity and Existence of an Allegedly Reliable Informer Is Material to the Establishment of Probable Cause, the Court Must Require Disclosure.

Lieutenant Delau (the arresting officer), in his evidence, attempted to justify his actions on the basis of "information" that had allegedly been given him. Now, the rule that an informer's tip may supply "probable cause" for an arrest or search must be regarded as subject to numerous exceptions and qualifications. *Jones v. United States,* 362 U. S. 257 (1960); *Draper v. United States,* 358 U. S. 107 (1959). None of these exceptions or qualifications can be realistically created from the facts here; hence, our discussion at this juncture is concerned only with the propriety of the trial judge's ruling against disclosure and his reliance on the authority of *State v. Beck, supra.*

In Ohio, there is no statutory privilege of confiden-

tiality between policeman and informer. *In Re Story,* 159 Ohio St. 144, 147 (1953).

Be that as it may, even in jurisdictions where the privilege exists, the disclosure of the identity is required in order to allow a challenge to the validity of an arrest or the propriety of the issuance of a warrant. This limitation on the applicability of the privilege arises from the fundamental requirements of due process. The problem has been said to involve the balancing of the public interest, in protecting the flow of information, against the individual's rights to have the issues raised by his defense properly determined.

The constitutions of both the State and Federal Government prohibit the issuance of warrants except upon "probable cause." This thought is also memorialized by statute in Ohio's R. C., § 2933.22. In this regard one of the prime issues raised by our Motion was the alleged non-existence of probable cause. Certainly in this posture the reliability of the informant, the credibility of the police officer who acted upon the information disclosed, and the soundness of the reason for reliance upon the information are proper matters for exploration by the defense. Thus an accused is entitled to know the identity of the informer, to compel his testimony and then impeach his credibility. *Rovario v. United States,* 353 U. S. 53 (1957).

Moreover, where a determination of the lawfulness of a search and seizure depends upon the disclosure of the identity of the individual who allegedly gave information which led to the search and seizure, failure to require the disclosure of such person's identity should render the search unlawful and require that evidence obtained from the search and seizure be suppressed. See, *United States v. Blich,* 45 F. 2d 627 (1932, D. C. Wyo.), where the District Court ruled that the existence of probable cause could

only be properly determined if the identity of the informer were disclosed.

The word of an informer can supply "probable cause" for an arrest or search in certain qualified instances. The test, as presently stated by the Court in *Draper v. United States,* 358 U. S. 307 (1959), seems to support the view that what is observed must conform with what an informer told him would occur. Further the informer must be reliable in that "an uncorroborated tip by an informer whose identity and reliability are both unknown does not constitute probable cause." *Contee v. United States,* 215 F. 2d 324, 327 (1954). Also see, *Wrightson v. United States,* 222 F. 2d 556 (1955); *Worthington v. United States,* 166 F. 2d 57 (1948).

Since the Court did not require disclosure, the status of this confidential source was reduced to anonymity. Certainly if identity had been disclosed the defense could have explored the reliability of the informer, produced evidence to rebut any such showing as well as further show that reasonable grounds for reliance did not exist. *Wong Sun v. United States,* 371 U. S. 471 (1963). Further, it is just as important to a defendant to have access to a material witness who may satisfy the Court that evidence against him should be excluded, because obtained by unconstitutional means, as to have access to a material witness who may give evidence which will overcome in the eyes of a jury, for example, prosecution evidence against him on the merits of the charge. *People v. Robinson,* 166 Cal. App. 416 (1958).

In the final analysis, the conviction herein being challenged stands or falls on the determination of whether there was probable cause, which in turn depends, among other things, not only upon the existence of an informer but his reliability. By denying the request for disclosure,

the right to test the reasonableness of the officers' conduct (including but not limited to the reasonableness of his reliance on such informer) was thereby frustrated. The real fault characteristic, in addition to foreclosing even the possibility of a rational appraisal by the Court, is that such procedure permits the policeman to conclusively determine the validity of his own arrest. Why such an approach is not consistent with the constitutional standards developed by the Supreme Court is obvious.

In our view the cogent arguments in favor of disclosure are most compelling. Consider, in this regard, the view expressed in *Jones v. United States,* 271 Fed. (2d) 494, 499 (1959) in which the rule was stated:

> "To give vitality to the requirement of reliability the law requires, if no probable cause exists without the information from informer, that his identity be divulged, so that his reliability may be subjected to a meaningful judicial scrutiny rather than accepted on a policeman's word."

CONCLUSION.

In seeking a reversal of the convictions herein, counsel is reminded of the sagacious remarks of Mr. Justice Jackson concurring in *McDonald v. United States*, 335 U. S. 451, 459 (1948):

> "While the enterprise of parting fools from their money by the 'numbers' lottery is one that ought to be suppressed, I do not think its suppression is more important to society than the security of the people against unreasonable searches and seizures."

Here it has been urged that the warrant, the arrest, the search and seizure were consummated not only in violation of the constitution but in defiance thereof. Fortunately this penchant, possessed by the Cleveland Police, for assuming that they will be protected and pampered in this area, and that they need not comply with the law, cannot and will not be sanctioned.

Ostensibly the warrant issued herein is premised on the idea that the officers had a right to search these premises because probable cause existed to believe that certain property subject to seizure was in the possession of various unknown individuals. As urged above, the failure of affiant to particularize or otherwise describe these persons must reflect adversely on the idea that they had such probable cause. Thus, in view of the prohibition against general or exploratory searches, a warrant to search premises merely to see who is in possession, if anyone, is invalid on its face.

This case then presents, *inter alia*, a serious question as to whether a search warrant could properly issue on an affidavit which only set forth the naked assertion that "the FACTS upon which * * * [affiant's] belief [that contraband was in the possession of 'unknown persons'] is based are as follows: observations by members of the Cleveland

Police Department and information from confidential sources" (Emphasis added).

Also presented is the question as to whether there is a necessity for the issuing magistrate to have knowledge concerning the reliability of an unnamed person on whose information the affiant's belief in part was said to be based, which facts would at least permit a judgment as to whether such informer was sufficiently trustworthy. *Aguilar v. Texas, supra,* at 114 fn. 4.

Additionally, there is the query as to whether this crucial determination of probable cause, to be made by a neutral and detached magistrate, can be based on facts other than those stated under oath in the affidavit; i.e., uncommunicated information possessed by the affiant or his good faith belief that probable cause exists.

In our judgment, the analogy between the case here on appeal and *Aguilar v. Texas* is almost perfect.[6] In reasoning to the conclusion in *Aguilar* this Court was concerned that the affidavit did not contain an affirmative allegation that the affiant spoke with personal knowledge of the matters contained therein, nor did it (the affidavit) contain an affirmative allegation that the affiant's unidentified source spoke with personal knowledge. Further in footnote 4, of the opinion, the Court made the following cogent statement:

> "To approve this affidavit would open the door to easy circumvention of the rule announced in *Natherson*

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[6] In *Aguilar,* the following requirements for a State search warrant were set forth:

> "although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, * * *, the magistrate must be informed of * * * some underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, * * *, was credible or his information was 'reliable.'"

> and *Giordenello*. A police officer who arrived at the 'suspicion,' 'belief,' or 'mere conclusion' that * * * [contraband was] in somone's possession could not obtain a warrant. But he could convey this conclusion to another police officer, who could then secure a warrant by swearing that he had 'received reliable information from credible persons' that the * * * [contraband was] in someone's possession."

Surely, when the precedential authority of *Aguilar* is brought to bear on an affidavit such as is involved herein —which only recites the "mere conclusion" of the affiant that he had "information from confidential sources" and that "observations" were made—it cannot be said that these bare assertions provided a sufficient basis for the requisite determination that probable cause existed for the issuance of the search warrant.

Also, and quite apart from the patent defects in the warrant and supporting affidavit, are questions (1) involving the fact that, in trespassing upon private property in quest of evidence, the officers violated a State statute. This statute (R. C. of Ohio, § 2909.21) provides that "no person shall enter without lawful authority upon the land or premises of another." And (2) the right of a state to refuse to require disclosure of an unnamed and unidentified informer, where no probable cause can be shown to exist without his information.

Although this Petition was in the process of being printed when the decision of *Stanford v. Texas* (____ U. S. ____; 33 USLW 4140 [January 18, 1965]) was announced, it is being specifically inserted here because it does support our cause. Even more important it is petitioners' hope that Counsel for the Respondent will seek to distinguish it; bearing in mind, of course, in our "Motion to Quash

Search Warrant and Motion to Suppress" it was contended that,

"* * *,

(4) The search warrant as issued was further defective in the following respects: [a] was general in nature, [b] failed to particularly describe the place to be searched and the person, property or thing to be seized, * * *,

(6) That the warrant as issued authorized a general or exploratory search, the type of which is prohibited by law."

For the foregoing reasons it is therefore respectfully requested that a writ of certiorari be issued under the seal of this Court to the Cuyahoga County Ohio Court of Appeals to the end that the judgment of that Court may be reviewed and reversed.

JAMES R. WILLIS,
Attorney for Petitioners.

APPENDIX I.

JOURNAL ENTRY OF THE COURT OF APPEALS OF THE EIGHTH JUDICIAL DISTRICT OF OHIO, CUYAHOGA COUNTY.

(June 1, 1964.)

This cause came on to be heard on the appeal on questions of law from the judgment and sentence of the Common Pleas Court and was argued by counsel for the parties; and upon consideration, the Court finds no error prejudicial to the appellant and therefore the judgment and sentence of the Common Pleas Court is affirmed and it is ordered that appellee recover of appellants its costs herein taxed.

It is ordered that a special mandate issue out of this Court directing the Common Pleas Court to carry this judgment into execution.

Appellants except.

APPENDIX II.

JOURNAL ENTRY OF THE SUPREME COURT OF THE STATE OF OHIO DISMISSING APPEAL.

(October 14, 1964.)

This cause, here on appeal as of right from the Court of Appeals for Cuyahoga County was heard in the manner prescribed by law and upon motion of the appellee to dismiss such appeal.

On consideration thereof, such appeal is dismissed for the reason that no substantial constitutional question exists herein.

APPENDIX III.

ORDER OF THE SUPREME COURT OF OHIO DENYING MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS.

(October 14, 1964.)

It is ordered by the Court that this motion is overruled.

APPENDIX IV.

ORDER OF THE SUPREME COURT OF OHIO DENYING REHEARING.

(November 18, 1964.)

It is ordered by the Court that rehearing in this case is denied.

APPENDIX V.

AFFIDAVIT FOR SEARCH WARRANT.

IN CLEVELAND MUNICIPAL COURT

Before me, Norman A. Furst a Judge of Cleveland Municipal Court personally came Carl Delan who being duly sworn according to law, deposes and says, that on or about the 17 day of May A. D. 1962, at the City of Cleveland in said County of Cuyahoga, the following described personal property, to-wit:

*1. Clearing House bet slips, bet sheets, tapes, adding machines and other paraphernalia generally associated with clearinghouse operations ~~of the value of~~ .....,

~~Dollars, the personal property of one ....., of said City and County, which personal property was by some person or persons unlawfully stolen, taken and carried away, taken by robbers, embezzled, and/or obtained under false pretenses.~~

2. ~~Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or~~ such objects or articles are in the possession of one unknown persons with the intent to use the same as a means of committing crime, to-wit:

possession of bet slips, promoting scheme of chance

3. ~~Forged or counterfeited coins, stamps, imprints, labels, trade marks, bank bills or other instruments of writing and/or dies, plates, stamps or brands for making them; books, pamphlets, ballots, or printed papers containing obscene language, prints, pictures, or descriptions manifestly tending to corrupt the morals of youth, obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self pollution.~~

4. ~~Gaming table, establishment, device or apparatus kept or exhibited for the unlawful gaming or to win or gain money or other property and money, or other property won by unlawful gaming.~~

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain two story brick commercial & residential building, located at 739 E. 125 suites #5 & #6 up. ~~in said City and County and known as _____~~. Affiant further deposes

and says that the facts upon which such belief is based are as follows:

Observations by members of the Cleveland Police Department and information from confidential sources.

Search to be made in the day Season _____

Said affiant further says that John Doe (Real Name Unknown) did unlawfully have in his possession said personal property as aforesaid: _____ and further deponent says not; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Ohio.

X CARL DELAN, Sgt.

Sworn to and subscribed before me, this 17 day of May A. D. 1962

RALPH S. LOCHER
Prosecuting Attorney
of Cleveland Municipal Court,

By PAUL D. WHITE.
Assistant Prosecutor.

NORMAN A. FURST,
Judge of Cleveland Municipal Court.

*(Strike out allegations not applicable)

APPENDIX VI.

PERSONAL PROPERTY SEARCH WARRANT.

To the Bailiff of Cleveland Municipal Court—

Greeting:

WHEREAS, there has been this day filed with me, Norman A. Fuerst, Judge of Cleveland Municipal Court, an affidavit for search warrant, of which the following is a copy:

Before me, Norman A. Furst a Judge of Cleveland Municipal Court, personally came Carl Delan who being duly sworn according to law, deposes and says, that on or about the 17 day of May A. D., 1962, at the City of Cleveland in said County of Cuyahoga, the following described personal property, to-wit:

*1. Clearinghouse bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with clearinghouse operation ~~of the value of ....., Dollars, the personal property of one ....., of said City and County, which personal property was by some person or persons unlawfully stolen, taken and carried away, taken by robbers, embezzled, and/or obtained under false pretenses.~~

2. ~~Weapons, implements, tools, instruments, articles or property used as a means of the commission of crime and/or~~ such objects or articles are in the possession of one unknown persons with the intent to use the same as a means of committing crime, to-wit:

possession of bet slips, promoting scheme of chance

3. ~~Forged or counterfeited coins, stamps, imprints, labels, trade marks, bank bills or other instruments of writing and/or dies, plates, stamps or brands for making them; books, pamphlets, ballots, or printed papers con-~~

~~taining obscene language, prints, pictures, or descriptions manifestly tending to corrupt the morals of youth, obscene, lewd, indecent or lascivious drawings, lithographs, engravings, pictures, daguerreotypes, photographs, stereoscopic pictures, models or casts, and instruments or articles of indecent or immoral use, or instruments, articles or medicines for procuring abortions, or for the prevention of conception, or for self pollution.~~

4. ~~Gaming table, establishment, device or apparatus kept or exhibited for the unlawful gaming or to win or gain money or other property and money, or other property won by unlawful gaming.~~

5. That affiant believes and has good cause to believe that said personal property, or some part thereof is located and concealed in said City and County in a certain two story brick and residential building located at 730 E. 125 St. suite #5 and #6 upstairs ~~in said City and County and known as~~ _____. Affiant further deposes and says that the facts upon which such belief is based are as follows:

Observations by members of the Cleveland Police Department and information from confidential sources.

Search to be made in the day Season _____
(If search to be made in the night season, state reasons therefore.)

and further deponent says not; contrary to the form of the Statute in such cases made and provided and against the peace and dignity of the State of Ohio.

These are therefore, to command you in the name of the State of Ohio, with the necessary and proper assistance, to enter, in the day season or the night season, into said building garage, or other building in connection therewith as aforesaid, and there diligently search for Clearinghouse

bet slips, bet sheets, tapes, adding machines and other paraphernalia associated with Clearinghouse operations. and that you bring the same or any part thereof, found on such search, and also the body of John Doe (real name unknown) or Jane Doe (real name unknown) forthwith before our Municipal Court aforesaid to be disposed of and dealt with according to law.

Sworn to before me by the said Carl Delan and subscribed in my presence this 17 day of May, 1962.

GIVEN UNDER MY HAND, and seal of said Court, this 17 day of May, 1962.

NORMAN A. FURST
Judge of Cleveland Municipal Court

HELEN J. LYONS,
Clerk of Cleveland Municipal Court

By J. F. DEMPSEY
Deputy Clerk.

APPENDIX VII.

MOTION TO QUASH SEARCH WARRANT AND MOTION TO SUPPRESS.

Now comes the defendants, Joseph Harper, Leonard Schumpert, Augusta Humphrey, Mamie Bishop, Juanita Umphery, and Janice Thomas, by and through their duly retained counsel and respectfully moves this Court to quash the said search warrant issued herein, and to order the alleged property seized pursuant thereto, suppressed as evidence, which might otherwise be illegally used against them, and in support thereof aver as follows:

(1) That the affidavit on which said warrant is based fails to allege sufficient facts or allegations of facts and that such defect is fatal according to the statute in such cases made and provided, to-wit: Revised Code of Ohio, Section 2933.22.

(2) That the search warrant was improperly issued in that the affidavit was based on hearsay and conclusions rather than the affiant's personal knowledge or the existence of reasonable grounds to believe that the crime alleged was in the process of commission and that such defect is fatal according to the Constitution in such cases made and provided.

(3) That said search warrant was issued in violation of the Fourth Amendment of the U. S. Constitution and Article I, Section 10 of the Ohio Constitution and for the further reason that no probable cause existed as is required thereby.

(4) The search warrant as issued was further defective in the following respects: (a) was general in nature, (b) failed to particularly describe the place to be searched and the person, property or things to be seized.

(5) That the said warrant which purports to authorize the search of "John Doe" does not constitutionally authorize the search of any individual; hence, a search pursuant thereto of an individual is unwarranted, illegal, unconstitutional and void.

(6) That the warrant as issued authorizes a general or exploratory search, the type of which is prohibited by law.

(7) The warrant was not served in accordance to Revised Code of Ohio, Section 2935.12, the statute provided in such cases for the execution of search warrants.

WHEREFORE, the defendants pray that the search warrant herein be quashed for the reasons above set forth, as well as others to be disclosed at the hearing on this motion, and that the property thereby obtained be suppressed as evidence.

JAMES R. WILLIS,
Attorney for Defendants.